Supreme Court, U.S.
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No. 91-2049

In the Supreme Court of the United States

OCTOBER TERM, 1992

PETE LE'MON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union had not acted arbitrarily, in violation of its duty of fair representation, by failing to give timely notice of a labor dispute to mediation authorities before calling a strike and by encouraging employees to continue the strike after they had been discharged because of the untimely strike notice.

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OPINIONS BELOW

The opinion of the court of appeals after remand from this Court (Pet. App. 3a-8a) is reported at 952 F.2d 1203. The earlier opinion of the court of appeals (Pet. App. 11a-20a) is reported at 902 F.2d 810. The decision and order of the National Labor Relations Board (Pet. App. 21a-29a), including the decision of the administrative law judge (Pet. App. 30a-48a), are reported at 291 N.L.R.B. 282.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1991. A petition for rehearing was denied on March 24, 1992. Pet. App. 1a-2a. The petition for a

writ of certiorari was filed on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed at the Albuquerque, New Mexico, manufacturing plant of Aztech International, Ltd. (the Company). The Company's employees were represented by the Sheet Metal Workers' International Association Local Union No. 49, AFL-CIO (the Union), and were covered by a collective bargaining agreement effective through September 30, 1985. Pet. App. 31a-32a. In the Spring of 1985, the Union initiated negotiations for a new agreement. Thereafter, the employees voted to authorize the Union to call a strike should negotiations fail. On September 30, Union Business Agents Gary Briggs and George Gilliland met with the employees to discuss the Company's final contract offer. Briggs expressed the view that the offer was inadequate. He told the employees that their only options were to accept the contract or to strike, and he explained that a strike entailed the risk that they would be replaced or fired. *Id.* at 33a-35a. On October 1, the employees went on strike, and established a picket line at the Company's premises. *Id.* at 35a.

On the day the strike began, Company President Bennett King hand-delivered or mailed to each of the strikers a letter stating that the strike was illegal because the Union had failed to give proper notice of a labor dispute to the Federal Mediation and Conciliation Service (FMCS);[1] therefore, the letter stated, the National Labor

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[1] Section 8(d)(3) of the Act, 29 U.S.C. 158(d)(3), requires a party seeking termination or modification of a collective agreement to give the FMCS notice at least 30 days before the expiration of the contract. Section 8(d)(4), 29 U.S.C. 158(d)(4), precludes a strike within 60 days of the requisite notice. Section 8(d) further

Relations Act (the Act) did not protect the strikers from discharge, and the strikers were discharged effective immediately. The letter added that strikers who wished to return to work would have to fill out applications to be hired as new employees. Pet. App. 35a-36a.

When several strikers asked Briggs and Gilliland about the Company's discharge letter, they responded that it was a "ploy" and "rhetoric." The Union agents advised the employees to "stick together." Briggs added that, regardless of the legality of the strike, the strikers could prevail if they could put enough pressure on the Company. Pet. App. 22a, 36a.[2] On October 5, an article in a local paper reported that the National Labor Relations Board's Regional Office had issued an unfair labor practice complaint based on the Company's charge that the notice was untimely. The article quoted a Board official's assertions that the picketing was unlawful. *Id.* at 36a. After publication of the article, Briggs and Gilliland continued to tell strikers that the discharges were a company tactic and that the strikers should "stick together" and try to win the strike. *Id.* at 22a, 36a.

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provides that "[a]ny employee who engages in a strike within [the 60 day] period * * * shall lose his status as an employee of the [struck] employer * * * for the purposes of [the Act]." Pet. App. 56a-58a.

[2] Neither Briggs nor Gilliland was aware that the Section 8(d)(3) notice was late. Pet. App. 33a. The Union's attorney, Gerald Bloomfield, had in fact mailed untimely notice to the FMCS on September 11, and the FMCS received it on September 17, 13 days before the contract was to expire. *Id.* at 32a-33a. Upon learning of the Company's letter, Briggs attempted to reach Union Attorney Bloomfield to ask about the notice, but Bloomfield was out of town. Briggs spoke with another attorney in Bloomfield's office but was unable to learn the date or circumstances of the filing. *Id.* at 37a. Briggs and Gilliland thought that the Company was mistaken in contending that timely notice of the strike had not been given.

By October 7, most of the strikers had abandoned the strike. Briggs then told the remaining strikers that the strike had been lost and that they should try to go back to work. Pet. App. 37a. Some strikers who had not been replaced were rehired immediately by the Company; others were rehired subsequently. All of the strikers who were rehired came back as new employees. *Ibid.*

Employees subsequently filed a petition with the Board's Regional Office seeking an election to decertify the Union as their collective bargaining representative. When the Union received the petition, it disclaimed interest in representing the employees. Pet. App. 37a-38a.

2. Based on petitioner's charge, the Board's Regional Office issued a complaint alleging that the Union breached its duty of fair representation under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by its conduct respecting the strike. Pet. App. 30a-31a. The Board (Chairman Stephens dissenting in part), in agreement with the administrative law judge, dismissed the complaint. *Id.* at 24a-25a.

The Board explained that, while the Union's representation here "may not meet the standards of competence and caution that the Board would like to see observed[,] * * * [a] breach of duty of fair representation occurs only when the representative's conduct is 'arbitrary, discriminatory, or in bad faith.'" Pet. App. 24a (citing *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967)). Applying that standard, the Board unanimously agreed with the ALJ that the Union's failure to ensure that the strike did not commence until sixty days after a timely filing of the notice was "no more than mere negligence," and therefore

did not violate the duty of fair representation.[3] Pet. App. 22a.

The Board majority also found that the Union's conduct after October 2 "was not so lacking of a rational or logical basis as to be arbitrary." Pet. App. 23a. The Board explained that the Union agents thought that job loss was a risk in any strike, and that tactically the employees' "best protection" was to continue the strike even if the notice was deficient. Moreover, "even if the agents had understood that the strikers lost status as employees of the [Company] by operation of statute or had in fact been permanently discharged * * *, there was little they could do to benefit the employees at that point." *Id.* at 23a-24a. Since the employees had to apply for jobs as new employees, the Board concluded that "[i]t was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action."[4] *Ibid.*

3. The court of appeals agreed with the Board that the Union had not breached its duty of fair representation. However, the court did not pass on the Board's conclusion that the Union conduct was not arbitrary within the meaning of *Vaca* v. *Sipes*. Rather, the court held that the duty of fair representation is not implicated when "the injury suffered is common to the majority of represented employees." Pet. App. 20a. The court explained

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[3] The Board assumed, arguendo, "that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation." Pet. App. 24a n.5.

[4] Chairman Stephens would have found "that the Union's business agents * * * behaved in a manner that went beyond mere negligence to reckless disregard of the harm to the employees through actions that they took after they were put on notice [as of October 2] of the clear possibility that the strike notice had not been timely given and that the [Company] was taking action against the employees because of this." Pet. App. 27a.

that, "[a]s the duty-of-fair representation doctrine has evolved, its function as the protector of minority and individual employee rights * * * has been emphasized consistently." *Id.* at 17a. Since "the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of [Company] employees represented by the Union," the court concluded that the employees, "by virtue of their majority status," had available to them the "powerful remedy of ouster"—which they used—and thus did not need the protection afforded by the duty of fair representation. *Id.* at 17a-18a.

4. On March 25, 1992, this Court granted petitioner's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration "in light of *Air Line Pilots Association International* v. *O'Neill*, 111 S. Ct. 1127 (1991), and *United Steelworkers of America, AFL-CIO-CLC* v. *Rawson*, 495 U.S. 362 (1990)." *Le'Mon* v. *NLRB*, 111 S. Ct. 1383 (1991).

5. On remand, the court of appeals disavowed its prior rationale, noting that "*O'Neill* holds * * * that the judicially-created duty of fair representation applies to 'all union activity,' * * * thereby invalidating our prior analysis." Pet. App. 4a. However, the court reaffirmed its previous ruling that the Union had not breached its duty of fair representation, agreeing with the Board that the Union's behavior was "negligent rather than arbitrary, and therefore not in violation of its duty." *Id.* at 5a. The court disagreed with petitioner and the dissenting Board member that "the Union representatives' exhortation to continue the strike after they learned of its possible illegality goes beyond mere negligence." *Id.* at 7a. The court also rejected petitioner's contention that "the Union acted with knowledge of the strike's illegality throughout the relevant period." *Ibid.* Rather, the

court accepted the Board's factual finding that the Union representatives "did not know" of the strike's illegality and they "were unable to verify the employer's claim of illegality and assumed that it was merely a tactic to break the strike." *Ibid.*

ARGUMENT

In *United Steelworkers* v. *Rawson*, this Court reaffirmed the rule of *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967), that a breach of the duty of fair representation "occurs 'only when a union's conduct * * * is arbitrary, discriminatory, or in bad faith.'" 495 U.S. at 372. The Court emphasized that "mere negligence * * * would not state a claim for breach of the duty of fair representation." 495 U.S. at 372-373. In *Air Line Pilots Ass'n Int'l* v. *O'Neill*, 111 S. Ct. 1127, 1135 (1991), the Court held that the *Vaca* standard applies to contract negotiation as well as contract administration. But it cautioned that "[a]ny substantive examination of a union's performance * * * must be highly deferential" and that a union may be held to have breached its duty of fair representation only when its conduct is "wholly irrational or arbitrary." *Id.* at 1135-1136 (internal quotation marks omitted). The court of appeals correctly applied those principles in upholding the Board's determination that the Union had not breached its duty of fair representation in the circumstances presented in this case. There is no conflict among the circuits. Further review therefore is not warranted.

1. Petitioner claims (Pet. 12-16) that the court of appeals erred in upholding the Board's finding that the Union's conduct amounted to mere negligence. That fact-bound claim does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In any event, the Board's finding is supported by the evidence.

The credited testimony shows that the Union agents did not know that the notice to the FMCS had not been timely filed when the decision to strike was made. However, they did inform the employees that they might be permanently replaced or discharged if they struck.[5] Pet. App. 34a-35a, 45a. Moreover, the Board majority reasonably concluded that, although the Union agents "may have acted negligently" after learning of the Company's discharge letter on October 2, "their conduct was not so lacking of a rational or logical basis as to be arbitrary." *Id.* at 23a. Unable to reach their attorney, the agents acted within the limits of "their competence and experience" (*ibid.*) in telling the employees that the letter was company "rhetoric" or a company "ploy," and in urging them to "stick together." *Id.* at 22a.

As the Board explained (Pet. App. 23a), "[t]he agents were not lawyers and did not seem to understand the effect that the failure to give proper 8(d) notice had on the strikers' status as employees"; indeed, as shown by their earlier warning as to the risks of a strike, they did not even "appreciate the distinction between terminating strikers' employment and replacing strikers."[6] *Ibid.* Accordingly, "[t]hey considered the Employer's statement that the strikers' employment was terminated as a tactical maneuver designed to break the strike," and "judged economic pressure to be the most effective strategy to deal with the situation." *Id.* at 23a-24a. Indeed, as the Board noted, "even if the agents had under-

[5] The Union agents mistakenly equated permanent replacement with discharge. See *NLRB* v. *International Van Lines*, 409 U.S. 48, 50-51 (1972).

[6] See *Freeman* v. *O'Neal Steel, Inc.*, 609 F.2d 1123, 1127 (5th Cir), cert. denied, 449 U.S. 833 (1980) ("union representative is not a lawyer and he cannot be expected to function as one"); accord *Harris* v. *Schwerman Trucking Co.*, 668 F.2d 1204, 1207 (11th Cir. 1982).

stood that the strikers lost status as employees of the Employer by operation of statute or had in fact been permanently discharged by the Employer," the employees' only other option at that point would be to apply for jobs as new hires. "It was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action." *Id.* at 24a.

2. a. Petitioner contends (Pet. 16-18) that the decision of the court of appeals conflicts with a pre-*Rawson* decision of the Ninth Circuit holding that negligence may constitute a breach of the duty of fair representation where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." *Dutrisac* v. *Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983). Applying that principle, the Ninth Circuit in *Dutrisac* found that the union had breached the duty by its negligent failure to timely file a notice of arbitration over a grievance it believed to be meritorious. *Id.* at 1272, 1274.

Even before *Rawson*, the Ninth Circuit had made clear that *Dutrisac* did not establish a *per se* rule. In *Eichelberger* v. *NLRB*, 765 F.2d 851 (1985), the Ninth Circuit upheld the Board's determination that the union's negligent failure to timely inform a grievant that it would not seek arbitration of her grievance did not violate the duty of fair representation. Explaining *Dutrisac*, the court stated that, even where the union has failed to perform a ministerial act, "courts and administrative bodies are not constrained to find a breach, but must carefully weigh the circumstances of each particular case in light of established principles of law." 765 F.2d at 855. See also *Peterson* v. *Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986).

In any event, the proposition that a negligent failure to perform a ministerial act may constitute a *per se* violation of the duty of fair representation is at odds with *Rawson*. There, in holding that mere negligence is not sufficient to establish a breach of the duty of fair representation, the Court made no distinction between a union's negligence in failing to perform a ministerial act or a so-called mandatory duty (as is alleged in this case) and its negligent failure to perform other obligations (such as the contractual obligation at issue in *Rawson*). As the facts here show, in both situations, the union's failure may be the result of simple negligence that is not properly characterized as arbitrary. Indeed, in a post-*Rawson* case, the Ninth Circuit acknowledged that "mere negligence" does not breach the duty of fair representation, and also recognized that "differentiating a ministerial task from a judgment call is not always easily accomplished" and is "in some sense illusory." *Peters* v. *Burlington N. R.R.*, 914 F.2d 1294, 1299-1300 (1990).

b. Petitioner further urges (Pet. 19) that, because of the critical role Section 8(d) notices play in promoting collective bargaining over strikes that disrupt commerce, "Congress could never have intended that national labor law should immunize such disruption were its source the unions' 'merely negligent' behavior." However, the fact that the union's failure is not a breach of its duty of fair representation does not "immunize" the disruption to commerce: as occurred here, the resulting strike is unprotected by the Act and the participating employees are subject to discharge. Petitioner is correct (Pet. 20) that a union's negligent failure to timely file the Section 8(d) notice has a severe effect on the striking employees. However, the consequences of the union's negligence on the employees—i.e., the loss of a job—is no greater than would be the case were the union to make negligent missteps in numerous other

contexts, such as grievance proceedings in which the jobs of one or more employees may be at stake.

Petitioner also asserts (Pet. 20-22) that duty of fair representation claims arising out of contract negotiation or grievance processing are different from claims based on a failure to fulfill a duty imposed by Section 8(d); the former activities require an exercise of judgment, whereas no exercise of judgment is called for in respect to an 8(d) notice. Accordingly, petitioner argues, applying a *per se* rule in the latter situation would not offend the teaching of *O'Neill* that a union must be accorded a "wide range of reasonableness" (111 S. Ct. at 1130), for there is no occasion to assess the reasonableness of the union's conduct and any failure to perform is therefore arbitrary as a matter of law.

There is no merit to petitioner's contention. This Court in *O'Neill* rejected the argument that the standard for assessing whether a union had fulfilled its duty of fair representation should vary according to the function performed by the union. It concluded that, whether the union activities subject to the duty of fair representation could be classified as "contract administration" or "contract negotiation," or "fall into neither category," the "tripartite standard announced in *Vaca* v. *Sipes*" was to be applied in determining if the duty had been breached. 111 S. Ct. at 1135. That standard requires that the union conduct constitute more than simple negligence. Since such negligence was all that the union committed here, the duty of fair representation claim must fail.[7]

[7] Petitioner also contends (Pet. 22-23) that a *per se* rule should apply here because the case involves the Union's "*nondisclosure* of information it alone possessed that was critical to the employees' welfare." That contention, however, is contrary to the factual findings of the Board, which were affirmed by the court of appeals. The Board found that the Union agents were unaware that

3. Finally, petitioner contends (Pet. 24-28) that Section 9(a) of the Act, 29 U.S.C. 159(a),[8] would be unconstitutional if a union's negligent failure to perform a duty mandated by Section 8(d) is not deemed a breach of the duty of fair representation. That is so, according to petitioner, because employees otherwise would be derived of liberty and property without due process of law since the union's statutorily conferred exclusive representative status forecloses any other means of obtaining compensation for loss of their jobs.

Petitioner's constitutional argument is not properly presented here because petitioner did not raise it before the Board. Under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts of appeals lack jurisdiction to consider claims that were not urged before the Board, unless the failure to object to the Board is excused by "extraordinary circumstances." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 n.10 (1979); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Moreover, petitioner did not timely raise the issue in the court of

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the Section 8(d) notice had not been timely filed when the strike decision was made and also were unaware of the legal significance of that failure.

[8] Section 9(a) provides that representatives selected by a majority of the employees in an appropriate bargaining unit shall be the exclusive representative of all the unit employees for purposes of collective bargaining, thereby extinguishing the right of any unit employee to deal individually with the employer for such purposes.

appeals[9] and suggests no reason why the Court should deviate from its "normal policy" of not considering issues not presented to the court of appeals. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In any event, petitioner's contention is mistaken. The contention is based on the premise that employees have a constitutionally conferred right to contract individually with their employer. Pet. 25-26. However, while the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances, see *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972), this is "not an absolute right," but one which may be restricted by government "in the public interest." *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 392 (1937).[10]

In the area of labor relations, Congress, in order to promote industrial peace, established the principle of collective bargaining through an exclusive representative selected by a majority of the bargaining unit. That principle of "necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes*, 386 U.S. at 182, and "extinguishes the individual employee's power to order his own relations with his employer." *NLRB* v. *Allis-*

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[9] Petitioner raised the constitutional issue for the first time in its petition for rehearing, which was denied. Pet. 10. Raising an issue for the first time in an application for discretionary review which is denied does not constitute raising the claim in the lower court for purposes of review by this Court. See *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992).

[10] Similarly, the Court has recognized that "[p]roperty interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577.

Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). In view of the exclusive bargaining representative's duty to represent fairly all employees in the unit, the Constitution does not preclude such extinction of individual employee rights, and the rights of individual employees are adequately protected by requiring the union to refrain from conduct which is "arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, 386 U.S. at 199; see also *id.* at 177; *United Steelworkers* v. *Rawson*, 495 U.S. at 372-373; *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 164 n.14 (1983). The Board found, and the court of appeals agreed, that the Union's conduct here was not in violation of that duty because, although it may have been negligent, it was not arbitrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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